

DISSENTING STATEMENT OF COMMISSIONER JULIE BRILL CONCERNING THE  
PROPOSED ACQUISITION OF MEDCO HEALTH SOLUTIONS INC. (MEDCO) BY  
EXPRESS SCRIPTS, INC. (ESI)

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A majority of the Commission has voted to ~~close~~ the investigation of ESI's acquisition of Medco. I cannot support this ~~act~~. In my view, the Commission

Pharmacy benefit management providers (PBMs) administer pharmaceutical benefits for most U.S. consumers under contracts with large self-insured plans or directly with employers. The three largest PBM providers in the United States today are ESI, CVS Caremark, and Medco. There is a reason why ESI, CVS Caremark, and Medco refer to themselves as the Big Three. ESI is currently the nation's leading PBM provider with 90 million covered lives, followed by CVS Caremark with 85 million, and Medco with 65 million covered lives. After the merger of ESI and Medco, the merged entity will be over five times larger than the third largest firm.

Under any definition of the market, this merger will create a highly concentrated market that should be presumed to be likely to enhance market power. In the large commercial employer market, the Big Three PBMs have a combined market share of between 80 and 90 per cent. This acquisition would therefore increase Herfindahl-Hirschman Index (HHI) concentration levels in this market from 2,760,063, an increase of over 1,300. This market definition is consistent with the approach taken

share. The pre-merger HHwld increase from 1,939 to 2,927 post-merger, with an increase of 988. And even in an all employer market, Big Three's nearest competitor, Aetna, would have a market share well below 10 per cent. Also note that Aetna depends on a strategic relationship with CVS Caremark, under which the latter provides several key management and administrative PBM services to Aetna. sincerely wish I could agree with the majority that the PBM market will consist of at least nine significant competitors post-merger, plus a fringe. However, I am at a loss to see how any of these

presumption of collusion' that attaches to a merger in such a highly concentrated market.<sup>10</sup> The majority is correct that the most plausible theory of collusion or coordinated interaction in this case is customer allocation; however, we cannot agree with the majority that the theory fails when



large-scale entry into the PBM market is difficult. As the Commission concluded as long ago as 1998 “[t]here are substantial entry



is true: three years from now, the Commission should conduct a thorough analysis of this industry to determine if prices to employers have gone down. We will sincerely hope that I am wrong about the effects of this merger, I believe – with deep sadness and concern – that will not prove to be the case.

After examining the totality of the evidence – the market structure, the data, the statements of executives of the merged parties and others, the fact that Medco would be poised to play a maverick in this market, the lack of entry capable of replicating the scale of competition lost through this merger, and the lack of efficiencies to overcome the presumption of anticompetitive effects – I respectfully dissent from the Commission's decision to close this investigation.